Supreme Court, U.S.
FILED
DEC 5 1995
CLERK

No. 95-760

In The

Supreme Court of the United States

October Term, 1995

HIGINIO ROMERO and FRANCES ROMERO, individually and HIGINIO ROMERO as Personal Representative of the Estate of RICHARD ROMERO,

Petitioners,

v.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO; DAVID DUARTE, THE SHERIFF OF LAKE COUNTY IN HIS OFFICIAL CAPACITY; SEAN DEFABBO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY SHERIFF OF LAKE COUNTY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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Date: December 5, 1995

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16 pp

QUESTIONS PRESENTED

1. Whether *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), precluded the court below from accepting jurisdiction over a denial of an immunity-based motion, where the historical facts were undisputed but where the district court found a dispute as to whether such facts would amount to a constitutional violation.

2. Whether the court below correctly determined that given such undisputed facts, there was no constitutional violation.

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BRIEF IN OPPOSITION

Respondent, Sean Defabbo,[1] respectfully requests that this Honorable Court deny the petition for writ of *certiorari* seeking review of the Tenth Circuit opinion in this case. That opinion is reported at 60 F.3d 702 (10th Cir. 1995).

COUNTERSTATEMENT OF THE FACTS

This case concerns whether the respondent officer violated petitioners' decedent's Fourth Amendment right when the officer shot and killed the decedent because the decedent attacked the officer with a knife.

Respondent relies, as did the Tenth Circuit, upon the facts set forth by the district court in its order. These facts are set forth below in their totality and are reprinted on page 10(a) of the petition:

> The facts appear to be as follows: On August 4, 1992, at approximately 1:00 a.m., Deputy Sheriff Defabbo received a report of an automobile in need of assistance. He responded to the report, although the car was located just outside Lake County in Eagle County. [The

[1] Petitioners incorrectly identified all defendants in the district court as appellants to the circuit court (and respondents herein). Only Deputy Sheriff Defabbo in his individual capacity appeared before the circuit court; although Sheriff Duarte had initially joined the interlocutory appeal, he was incorrectly named. *See Romero v. Board of County Commissioners*, 60 F.3d 702, 703 n.2 (10th Cir. 1995).

> respondent officer's jurisdiction was Lake County, not the adjacent Eagle County.]
>
> The car belonged to Richard Romero [petitioners' decedent]. Upon meeting him, [respondent] Defabbo believed he was intoxicated. Because Defabbo was outside his jurisdiction, he requested that Eagle County deputies be summoned to the scene. Defabbo detained Romero, but neither arrested nor physically restrained him.
>
> Before the Eagle County officials arrived, Romero approached Defabbo and punched him in the face. Romero then displayed a large knife, which he ran across Defabbo's stomach. Defabbo stepped back, drew his gun, and repeatedly told Romero that he would be shot if he did not drop the knife. Romero nevertheless raised the knife and approached Defabbo. Defabbo shot Romero three times, wounding him fatally.

The Tenth Circuit related substantially the same facts although it outlined a few more details of the incident. *See Romero v. Board of County Commissioners*, 60 F.3d 702, 703 (10th Cir. 1995). For purposes of its ruling, the Tenth Circuit made its factual assumptions explicit:

> We view the evidence in the light most favorable to the non-moving party. . . . Because plaintiff did not present any evidence to the contrary, we assume from Defabbo's evidence that Romero punched Defabbo and ran a knife across his stomach, that Defabbo retreated and drew his gun, that despite warnings to drop the knife, Romero approached Defabbo with the knife,

> and that Defabbo then shot Romero in self-defense.

Romero, 60 F.3d at 704.

Although petitioners now suggest some type of error in not submitting other facts to the district court prior to its ruling (*see* petition, pp. 2-3), the mechanism for presenting facts to oppose an immunity-based motion was available under Rule 56(f). This mechanism was previously outlined by the Tenth Circuit in the context of opposing immunity-based motions. *See Jones v. City and County of Denver*, 854 F.2d 1206, 1210-11 (10th Cir. 1988). However, in spite of this procedure, petitioners submitted no affidavit under Rule 56(f) demonstrating a need to discover and present further facts to the district court.

The trial court's ruling was explicit in finding only a dispute as to the legal significance of the undisputed facts, notwithstanding its mischaracterization that "genuine issues of material fact exist as to ***whether Defabbo's actions were objectively reasonable*** under the circumstances" (emphasis added). *See* district court's order reprinted in the petition, p. 12(a). The district court at no time stated that there was a dispute as to the historical facts; rather, the district court only stated in effect that there was a dispute as to whether those historical facts would support a legal conclusion of objective reasonableness under the circumstances. Even before this Court, petitioners assert no dispute as to an historical fact.

Finally, petitioners brought this Court's opinion of *Johnson v. Jones* to the attention of the Tenth Circuit both before and after the Tenth Circuit's opinion herein. Prior

to issuing the opinion on July 21, 1995, petitioners submitted supplemental authority pursuant to F.R.A.P. 28(j) (*see* respondents' appendix, p. 1(a)) and also presented the question in a petition for rehearing (*see* pertinent excerpt in respondents' appendix, p. 2(a)), which the Tenth Circuit denied. *See* petitioners' appendix, pp. 19(a)-20(a). Thus, the Tenth Circuit has already considered application of *Johnson v. Jones.*

REASONS WHY THE PETITION SHOULD BE DENIED

1. Jurisdiction in the Tenth Circuit was correct under *Johnson v. Jones.*

Johnson v. Jones concerns a traditional dispute of historical facts: whether the defendants were present and " 'stood by and allowed others to beat the plaintiff,' " 115 S. Ct. 2154, or whether they were not. If they were present, then they allegedly violated the plaintiff's constitutional rights; on the other hand, if they were not, then no such allegation could arise. Thus, resolution of this issue rose or fell upon the establishment of this historical fact.

The instant case concerns no such dispute of historical fact. Rather, the dispute, in the district court's words, concerned solely "whether Defabbo's actions were objectively reasonable under the circumstances." This is purely a legal question. *See Lennon v. Miller,* 66 F.3d at 416, 422 (2nd Cir. 1995) ("the question of whether it was objectively reasonable for the officers to believe that they did not violate the plaintiff's rights [in the context of an

alleged improper arrest] is purely a legal determination."). The fact that the district court misspoke and referenced this dispute as an "issue of material fact" is inconsequential, especially where the district court in the same sentence clearly defined this dispute as a legal dispute. *See also Christophel v. Kukulinsky*, 61 F.3d 479, 485 (6th Cir. 1995) ("a defendant's right to appeal the denial of qualified immunity does not turn on the phrasing of the district court's order, however").

Indeed, this Court stated in *Johnson v. Jones* that it would expect the courts of appeals to make such distinctions regarding reviewable and unreviewable orders:

> [it was argued that] if appellate courts try to separate an appealed order's reviewable determination (that a given set of facts violates clearly established law) from its unreviewable determination (that an issue of fact is 'genuine'), they will have great difficulty doing so. * * * [T]he court of appeals can simply take, as given, the facts that the district court assumed when it denied summary judgment for that (purely legal) reason.

Johnson, 115 S.Ct. at 2159. *See also Lennon v. Miller*, 66 F.3d 416, 422 (2nd Cir. 1995) ("inasmuch as the parties do not dispute the material facts and the court did not cite any such factual disputes, the question of the reasonableness of the officers' actions is the only question that could have prevented the court from ruling 'as a matter of law' on the qualified immunity defense. However, in the absence of a material factual dispute, the question of whether it was objectively reasonable for the officers to believe that they did not violate the plaintiff's rights is a

purely legal determination for the court to make"); *Stella v. Kelley*, 63 F.3d 71, 74 (1st Cir. 1995) ("the bottom line, then, is simply this: a summary judgment order which determines that the pretrial record sets forth a genuine issue of fact, as distinguished from an order that determines whether certain given facts demonstrate, under clearly established law, a violation of some federally protected right, is not reviewable on demand"); *Sanderfer v. Nichols*, 62 F.3d 151, 153 n.2 (6th Cir. 1995) (even though the district court cited evidence to support a constitutional violation, the circuit court found appellate jurisdiction because the plaintiff's version of the events, regardless of the sufficiency of the evidence, did not state a claim for a constitutional violation); and *Reece v. Groose*, 60 F.3d 487, 489-90 (8th Cir. 1995) (by its nature, an immunity-based motion is fact-intensive). Thus, it was proper for the court below to analyze the district court's order to determine that there were no disputes of historical facts, but only a dispute as to the legal significance of the undisputed facts.

Finally, because petitioners brought *Johnson v. Jones* to the attention of the Tenth Circuit on two occasions, there is no need for this Court to vacate the Tenth Circuit's opinion and remand for further consideration under *Johnson v. Jones*. Indeed, on the same date the Tenth Circuit issued its opinion in *Romero v. Board of County Commissioners* (July 21, 1995), it handed down its opinion in *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995), in which it *sua sponte* dismissed an appeal under the consideration of *Johnson v. Jones*.

Because *Johnson v. Jones* does not apply to the case herein, the Tenth Circuit properly had jurisdiction and

there is no reason for this Court to further review the matter.

2. There is no reason for this Court to consider the significance of the pre-seizure activity.

This issue is improperly presented on page 6 of the petition in the statement of the case, not in the argument. This alludes to the Tenth Circuit's disposal of petitioners' argument that the officer's failure to arrest and handcuff the decedent prior to the decedent's attack set forth a constitutional violation. *See Romero,* 60 F.3d at 705. This issue was properly resolved by the Tenth Circuit and there is no need for this Court to consider the issue.

CONCLUSION

For these reasons, the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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July 5, 1995

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RE: Romero v. BOCC of the County of Lake, et al, Case No. 94 C 1440

Dear Clerk:

Please reference Tyson Johnson Et Al, Petitioners v. Houston Jones, found at 63 LW 4552, decided by the United States Supreme Court on June 12, 1995 to the Response Brief for the proposition that a Defendant, entitled to invoke a qualified immunity defense, may not appeal a District Court's Summary Judgment Order in so far as that Order determines whether or not the pre-trial record sets forth a "genuine" issue of fact for trial. Enclosed is a copy of that ruling.

Also enclosed are seven (7) copies of this letter.

Very Truly yours,

ALEXANDER & RICCI

/s/ Joseph M. Ricci
Joseph M. Ricci
JMR:mas
Enclosures

cc: Robert Liechty
John Dunn

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 94-1440

HIGINIO ROMERO and FRANCES ROMERO, INDIVIDUALLY AND HIGINIO ROMERO AS PERSONAL REPRESENTATIVE OF THE ESTATE OF RICHARD ROEMRO,

Plaintiffs-Appellees,

vs.

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LAKE, STATE OF COLORADO; DAVID DUARTE, THE SHERIFF OF LAKE COUNTY IN HIS OFFICIAL CAPACITY; SEAN DEFABBO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY SHERIFF OF LAKE COUNTY,

Defendants-Appellants.

PETITION FOR REHEARING (INCORPORATING SUGGESTION FOR REHEARING IN BANC)

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SUGGESTION FOR REHEARING IN BANC
(Pursuant to 10th Cir.R. 35.2)

(a) I express a belief based on a reasoned and studied professional judgment that the panel decision is contrary to the following decision(s) of the Supreme Court or of the United States Court of Appeals for the Tenth Circuit, and consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

1. *Johnson v. Jones,* ___ U.S. ___, 63 U.S.L.W. 4553 (decided 6/12/95) (district court's denial of summary judgment, amounting to a determination that evidence in the pretrial record shows a genuine issue of fact for trial, rather than that a given set of facts violates pre-existing clearly established law, is not an immediately appealable "collateral order" pursuant to *Mitchell v. Forsyth,* 472 U.S. 511 (1985).

2. *Tennessee v. Gardner,* 421 U.S. 1 (1985), *Brower v. County of Inyo,* 489 U.S. 593, 595, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989), *Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443 (1989), and *Bella v. Chamberlain,* 24 F.3d 1251 (10th Cir.1994). An analysis of a 4th Amendment claim begins once the seizure occurs and consequently events thereafter are relevant to that determination. The totality of the circumstances must be considered when deciding an excessive force case.

COMES NOW Plaintiffs-Appellees ("Petitioners"), Higinio Romero and Frances Romero, by and through their attorney of record, Joseph M. Ricci of ALEXANDER & RICCI, and for their Petition for Rehearing and incorporating herein their suggestion for Rehearing In Banc in the above appeal would state as follows:

This panel of the 10th Circuit has ruled that Defendant-Appellant, DeFabbo, did not violate a clearly established constitutional right and that DeFabbo, therefore, is entitled to qualified immunity. In doing so, this Court overruled the District Court which decided genuine issues of material fact existed regarding the reasonableness of DeFabbos' use of deadly force and that DeFabbo failed to show he was unaware, or should not have known, of law clearly establishing the right to be free from unreasonable seizure. The Petitioners' position is that the law regarding the right to be free from unreasonable seizure by a police officer was clearly established on August 4, 1992 and the District Court is in a unique position to determine if genuine issues of fact existed concerning DeFabbo's conduct and violation of that right. Such determination is not properly reviewable under *Johnson v. Jones*, ___ U.S. ___, U.S.L.W. 4553 (decided 6/12/95).

The Petitioners recognize the basis for governmental immunity in the cases cited and relied upon in this Court's Order. Indeed, Petitioners would concur that it is appropriate to provide immunity to a police officer who must make split-second decisions after a seizure has been made to determine whether or not his life is in

* * *